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Before the
Federal Communication Commission
Washington, D.C. 20554

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In re

Joseph Frank Ptak
San Marcos, Texas

Order to Show Cause Why a
Cease and Desist Order Should Not Be Issued

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FCC MAIL ROOM

CIB Docket No. 98-44

**IN THE MATTER OF AN ORDER TO SHOW CAUSE AND
NOTICE OF OPPORTUNITY FOR HEARING**

**MOTION TO DISMISS SHOW CAUSE HEARING
AND ANY INDICTMENT FOR PRA VIOLATIONS**

On This Day Of May 10, 1998

COMES NOW BEFORE THE COMMISSION :

Joe Ptak, Jeffrey "Zeal " Stefanoff and the HAYS COUNTY GUARDIAN et.al, who are the founders and controllers of the radio station known as μ Kind Radio San Marcos currently acting in propria persona , pursuant to Rule 12, F.R.Cr.P., and does hereby move this Honorable Hearing for an order dismissing all counts in the cause hearing in this case on the basis that 44 U.S.C., §3512 precludes this prosecution. As grounds herefor, Ptak, Stefanoff and the Hays County Guardian et. al shows as follows:

1. Each count of the indictment and this show cause hearing herein avers that Ptak, Stefanoff and the Hays County Guardian et.al. violated 47 U.S.C., §§ 301 and 501 and the method by which he violated these laws was by his alleged transmission of radio signals without having first obtained a license to do so from the Federal Communications Commission;

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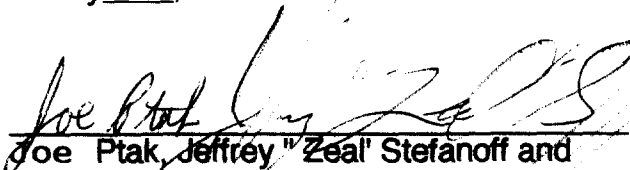
2. The requirement for Ptak, Stefanoff and the Hays County Guardian et.al. to obtain such a license from that Commission is predicated upon 47 U.S.C., §308, which in turn depends upon the regulations codified at 47 C.F.R., §§ 73.3511, et seq.;

3. The regulations codified at 47 C.F.R., §§ 73.3511, et seq., constitute "collections of information" pursuant to the 1995 Paperwork Reduction Act, 44 U.S.C., §§ 3501, et seq., and this latter act requires the display of OMB control numbers upon all regulations of this nature;

4. Since the regulations at 47 C.F.R., §§ 73.3511, et seq., fail to display OMB control numbers, the public protection provisions of 44 U.S.C., §3512 apply, and therefore Ptak, Stefanoff and the Hays County Guardian et. al. were not legally required to obtain a radio transmission license from the Commission; without such legal requirement, this prosecution must be dismissed.

Wherefore, the premises considered, Ptak, Stefanoff and the Hays County Guardian et. al. moves this Court to dismiss this indictment and the show cause hearing. In support of this motion, the following brief is offered.

Respectfully submitted this the 10 day of May____, 1998.


Joe Ptak, Jeffrey "Zeal" Stefanoff and
the Hays County Guardian, et. al
P.O. Box 305
San Marcos, Texas 78667

**Before the
Federal Communication Commission
Washington, D.C. 20554**

In re

Joseph Frank Ptak
San Marcos, Texas

CIB Docket No. 98-44

Order to Show Cause Why a
Cease and Desist Order Should Not Be Issued

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**IN THE MATTER OF AN ORDER TO SHOW CAUSE AND
NOTICE OF OPPORTUNITY FOR HEARING**

**BRIEF IS SUPPORT OF MOTION TO DISMISS
FOR PRA VIOLATIONS**

Ptak, Stefanoff and the Hays County Guardian et. al. have moved this Court to dismiss the instant indictment on the grounds that its further prosecution herein violates 44 U.S.C., §3512; this brief is submitted in support of that motion.

A. The Legislative History of the Paperwork Reduction Acts.

President Roosevelt commissioned the Central Statistical Board to study the problem of governmental paperwork on May 16, 1938,¹ and the Board's study thereafter became the basis for the Federal Reports Act of 1942 (herein "FRA"),² which constituted the first attempt by Congress to regulate the information collection activities of federal agencies. The FRA granted authority to the Bureau of the Budget to approve the requests of

¹ S. Rep. No. 479, 77th Cong., 1st Sess., (1941). The Central Statistical Board later became a part of the Bureau of the Budget, whose name was eventually changed to the Office of Management and Budget ("OMB").

² P.L. 77-831, 56 Stat. 1078 (1942), codified at 44 U.S.C., § 3501, et seq. (1981).

federal agencies seeking to collect information,³ and it prohibited any federal agency from engaging in such conduct if the Director did not approve the proposed collection of information.⁴ The act granted rule the making authority necessary for its implementation,⁵ and on February 13, 1943, such rules were promulgated.⁶ These rules clearly encompassed both forms used by federal agencies to collect information as well as agency regulations.

A weak attempt to strengthen the FRA was made in 1973,⁷ and revisions to Circular No. A-40 which implemented the FRA were made on May 3, 1973, again on February 10, 1976, and finally on November 5, 1976. In late 1974, Congress established a Commission on Federal Paperwork and directed it to study and report needed changes in the laws, regulations and procedures which would insure that information essential for the functioning of federal agencies was obtained with a minimal amount of burden, duplication and cost.⁸

³ 44 U.S.C., § 3509 (1976).

⁴ 44 U.S.C., §§ 3506, 3509(2) (1976).

⁵ 44 U.S.C., § 510 (1976).

⁶ Circular No. A-40, having application solely to federal agencies, was never published within the Federal Register. These regulations and subsequent amendments were effective until March 31, 1983, when regulations for the PRA were adopted.

⁷ See P.L. 93-153, 87 Stat. 576, § 409 (1973).

⁸ See P.L. 93-556, 88 Stat. 1789 (1974), codified at 44 U.S.C., § 3501 (1982).

On October 3, 1977, after lengthy and careful study of the matter of paperwork requirements mandated by federal agencies, the Federal Paperwork Commission submitted the last of its many reports.⁹ This Report concluded that while the existing FRA seemed sufficient to control the use of forms by federal agencies to collect information, it was insufficient to control the source for the use of such forms, i.e., agency regulations.¹⁰ Prior to this report, it had been suggested that Congress clarify and strengthen the FRA "to allow the clearance agency to challenge the need for regulatory information."¹¹ The Commission readily perceived that changing the rule making process of federal agencies was essential to reduce paperwork burdens:

"Rulemaking is, in essence, legislation by executive departments and agencies. Agency rules and regulations have the full force and effect of law, and translate broad congressional mandates into operational programs and practices.

"Most of the specific reporting and recordkeeping requirements imposed on the public stem from such rules and regulations."¹²

Still later, another report concluded as follows:

"The Act is not clear on its coverage of a major portion of the paperwork burden-- recordkeeping requirements-- although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines... Not all

⁹ A Report of the Commission on Federal Paperwork, Final Summary Report (Oct. 3, 1977).

¹⁰ Id., at 606.

¹¹ Report of the Comptroller General, "Status of GAO's Responsibilities Under the Federal Reports Act," May 28, 1976, at 20.

¹² Final Report, at 613.

agencies covered by the Federal Reports Act comply fully with its requirements.

"For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine."¹³

While legislation was proposed in 1976 to address the problem of federal paperwork burdens, it was not until 1979 that a major effort was undertaken in this respect. In hearings upon a paperwork reduction bill introduced in the Senate, Senator Lawton Chiles stated:

"While OMB is required to supervise the approval or disapproval of agency requests within 60 days, individuals, businesses, and State and local governments will be told they do not need to answer requests not acted upon by OMB.

"Forms without an OMB number on them will be 'bootleg forms' that the public can ignore."¹⁴

And while Senator Chiles stated the purpose of this proposed legislation, Senator Lloyd Bentson explained some of the problems the legislation was designed to address:

"Each of these reporting requirements, all of which have been approved by either OMB or GAO under the provisions of the Federal Reports Act, creates an average of ten separate forms-- and the staff at the GAO reported finding one OMB-approved reporting requirement that actually created 90 separate forms."¹⁵

¹³ The Reports Clearance Process, A Report of the Commission on Federal Paperwork 43 (1977).

¹⁴ Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcomm. on Governmental Affairs, at 12, 96th Cong., 1st Sess., (1979).

¹⁵ Id., at 131, 132.

Senator Bentson's sentiments in this regard were echoed by Gerald L. Hegel, of the Association of Records Managers and Administrators:

"The Federal Paperwork Commission addressed the issue of statutory recordkeeping and reporting requirements and found that, not statutes, but agency rules and regulations comprised the bulk of the paperwork burden. For example, in the Occupational Safety and Health Act, there are five references to reports from employers, but the Commission identified more than 400 reporting and recordkeeping references in OSHA regulations. Bear in mind that OSHA is not an isolated example."¹⁶

Plainly, this legislative history reveals a Congressional intent to make not only agency forms but also agency regulations subject to the control of the Office of Management and Budget ("OMB"). The intent and purpose of the proponents of such a law was to force federal agencies to comply by submitting their information collection requests to OMB for approval, and this approval by OMB was to be evidenced by the proper display of an OMB control number upon the item seeking information. If an agency did not comply, then the law was to have some "teeth": unapproved collections of information were to be considered "bootleg" requests that the public could ignore with impunity.

B. The 1980 and 1995 Paperwork Reduction Acts.

On December 11, 1980, the Paperwork Reduction Act of 1980 (herein "PRA") was approved; see Public Law 96-511, 94 Stat. 2812, previously codified at 44 U.S.C., §§ 3501, et. seq. This act in substance required all federal

agencies to submit to the Director of O.M.B. all "collections of information" for his approval and the assignment of O.M.B. control numbers; see §3507. Subsection (f) of this section provided as follows:

"An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request."

Section 3502(4) defined the term "collection of information" generally as the obtaining of facts or opinions by a federal agency "through the use of written report forms, ... reporting ... requirements, or other similar methods calling for ... answers to identical questions". An "information collection request" was defined in §3502(11) to mean "a written report form, application form, schedule, questionnaire, reporting or record keeping requirement, or other similar method calling for the collection of information".

The chief method of securing compliance by federal agencies with this act was §3512, which provided:

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

Clearly just from the act itself, federal agencies were required to submit to OMB all information collections requests for its approval, which was evidenced by the display of an OMB control number. If any collection of information failed to make the required display, the public was authorized to ignore the request with impunity.

Indeed, the Senate Committee on Governmental Affairs expressly so stated:

"The purpose of this section is to protect the public from the burden of collections of information which have not been subjected to the clearance process described by section 3507. Information collection requests which do not display a current control number or, if not, indicate why not are to be considered 'bootleg' requests and may be ignored by the public."¹⁷

The Public Protection Clause of the PRA was intentionally designed to enlist the support of the American public in helping OMB secure compliance with the commands thereof by the federal agencies. This was repeatedly stated in the many reports on this legislation, but was perhaps stated best by President Carter when he signed the bill on December 11, 1980:

"The act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public. For the first time it allows OMB to have the final word on many of the regulations issued by our Government. It also ensures that the public need not fill out forms nor keep records which are not previously approved by OMB."¹⁸

There can thus be no dispute that this act by clear legislative intent and express statutory provision was specifically designed to afford the American public a statutory right to refuse to provide to a federal agency information which had not been approved by OMB, and approval was to be demonstrated by the proper display upon the request of a control number. This right to refuse to provide information not approved by OMB could be exercised without running the risk of the imposition of penalties of any kind, civil or criminal.

¹⁷ ¹⁷ Senate Report No. 96-930, 1980 U.S. Code Cong. and Admin. News 6241, at 6292.

¹⁸ Presidential Documents, Administration of Jimmy Carter, December 11, 1980, at 2795.

The implementation of regulations for the PRA was hotly contested, and 54 federal agencies and 90 members of the public offered comments and criticisms of the proposed regulations.¹⁹ The major issue of concern related to whether agency regulations, current as well as those to be promulgated in the future, were subject to the requirements of the act, the federal agencies contending that only forms were covered by the act. This contention was rejected by O.M.B., which found:

"It is not possible to argue that OMB clearance authority is confined to forms and similar instruments Many reporting requirements are enforced by means of forms, but other reporting requirements and virtually all record keeping requirements are imposed by other means, including oral surveys, guidelines, directives, and --- most significantly --- regulations The only way all reporting and record keeping requirements can be covered by the Act is to cover these other methods for the collection of information, including regulations," *Id.*, at 13667.

"It follows that OMB has authority over reporting and record keeping requirements in rules that were in effect when the Act was passed as well as in rules subsequently issued with or without public notice and comment," *Id.*, at 13668.

"Pursuant to these authorities, the Director has concluded that all collections of information, including those mandated by regulations, must display a currently valid OMB control number," *Id.*, at 13669.

The initial regulations for the PRA thus expressly subjected agency regulations to the PRA clearance and approval process; see 5 C.F.R., §1320.14.

The act clearly required that forms seeking the collection of information must be approved by O.M.B. and had to display O.M.B. control numbers. But, regarding the

¹⁹ See preliminary remarks to such regulations, 48 Fed. Reg. 13666 (March 31, 1983).

instances in which specific "reporting requirement" regulations would likewise be subject to the PRA, the report stated:

"As discussed in connection with section 1320.7(d), any collection of information specifically contained in a regulation (such as a form printed as part of a regulation) is considered part of the collection of information requirement imposed by that regulation, and does not need an additional approval. Such a collection must display the control number assigned to the collection of information requirement in the regulation. On the other hand, a form is not considered to be 'specifically contained in' a regulation merely because the regulation refers to or authorizes the form. A generally valid test is that the form requires independent clearance if the information collection component of the related regulation cannot be enforced without the form. For example, if a regulation states that respondents must supply certain data 'on a form to be provided by the agency', the form must be cleared independently," Id., at 13682.

Stated differently, if a reporting requirement regulation simply mentions a form, both the regulation and the form must be separately approved by O.M.B., although sometimes both will display the same O.M.B. control number.

The first regulations promulgated for the PRA on March 31, 1983 (48 Fed. Reg. 13689), 5 C.F.R., part 1320, were specific in the requirements placed upon the information collection activities of federal agencies. Section 1320.4(a) of these regulations provided that:

"An agency shall not engage in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number and, unless OMB determines it to be inappropriate, an expiration date."

Section 1320.7 contained important definitions. A "collection of information" was defined as including forms

and reporting requirements, the latter being defined as "a requirement imposed by an agency on persons to provide information to another person or to the agency". By the plain terms of this definition, a "reporting requirement" encompassed a regulation which required the provision of information. The "display" of OMB control numbers meant the printing of such numbers in the upper right hand corner on forms. For regulations, the "display" of the control number was required to be a "part of the regulatory text or as a technical amendment". Section 1320.14 of these regulations plainly commanded federal agencies to obtain and display O.M.B. control numbers for agency regulations subject to the act.

Subsequent regulations for the PRA prove the above contention precisely; see 53 Fed. Reg. 16623, May 10, 1988. Section 1320.5 of this edition of the PRA regulations provided that:

"The failure to display a currently valid OMB control number for a collection of information contained in a current rule does not, as a legal matter, rescind or amend the rule; however, its absence will alert the public that either the agency has failed to comply with applicable legal requirements for the collection of information or the collection of information has been disapproved, and that therefore the portion of the rule containing the collection of information has no legal force and effect and the public protection provisions of 44 U.S.C. 3512 apply."

In May, 1995, Congress substantially amended the PRA in an obvious effort to rectify problems which had arisen under the earlier 1980 act.²⁰ Such apparently confusing terms like "collection of information requests" and

²⁰ See P.L. 104-13, 109 Stat. 163, currently codified at 44 U.S.C., §3501, et seq.

"collection of information requirements" were avoided in this new act, which contained at §3502(3), the following definition of the term "collection of information":

"(3) the term 'collection of information'--

"(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either --

"(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

"(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes..."

Under §3507 of the new act, Congress has continued its prior prohibition that no federal agency may solicit information without approval of the Director of OMB, which is indicated by "a control number to be displayed upon the collection of information." Like its predecessor, the new act also contains a public protection provision in §3512:

"(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if --

"(1) the collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or

"(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

"(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto."

Under the new PRA regulations, a "collection of

information" is defined in 5 C.F.R., §1320.3(c), as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons ... 'Collection of information' includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. As used in this Part, 'collection of information' refers to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate." There can be no doubt that existing agency regulations are subject to the PRA because §1320.12 of the PRA regulations clearly commands that they be submitted to OMB for approval.

This legislative and regulatory history plainly demonstrates that collections of information do appear within regulations adopted by various federal agencies and consequently, those regulations must be approved by OMB. Further, regulations subject to the PRA must display a control number, either in the text of the regulation itself or in a preamble to that text; see 5 C.F.R., §1320.3(f).

C. Litigation Under the PRA.

One of the first substantive appellate decisions acknowledging the statutory right of the public to

"regulate the regulators" was *United States v. Smith*, 866 F.2d 1092, 1098-99 (9th Cir. 1989). Here, a miner working on federal lands was charged with and convicted of failing to submit to the Forest Service's District Ranger a "Plan of Operations" commanded by a Forest Service regulation published at 36 C.F.R., §228.4. The Ninth Circuit noted that neither the form or regulation in question displayed a control number required by the PRA and its regulations. In defining the parameters of the PRA, that court held:

"This definition encompasses agency regulations that require disclosure of information to the government and that call for the disclosure or reporting of information through answers to standardized (identical) questions."

Here, because the Forest Service's applicable "collections of information" lacked the display of OMB control numbers, the Ninth Circuit reversed Smith's conviction as mandated by §3512.

Within a month of the decision in *Smith*, the PRA defense was pleaded in another case also involving a miner on federal lands who was similarly being charged with a failure to submit a "Plan." On appeal from the conviction in that case, the Court in *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990), held that compliance with the PRA was a jurisdictional prerequisite to the imposition of criminal penalties. Since the regulation at issue in *Hatch* likewise failed to display a control number, Hatch's conviction was reversed.

In *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77 (D.C. Cir. 1991), at issue was a regulation promulgated by the Department of Health and Human Services requiring regulated entities to

make available to the agency upon request certain "self evaluation reports." Here, the Court concluded that even this regulation which only indirectly required that information eventually be made available to an agency was within the scope of the PRA and subject to OMB approval.

The Supreme Court has had the opportunity to address the PRA in *Dole v. United Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929 (1990). When the regulations for the PRA were first adopted in March, 1983, those rules required federal agencies to submit to OMB not only those "information collection requests" which were to be submitted directly to the agencies, but also those requests concerning the provision of information to parties other than the federal agencies. These latter types of "disclosure" regulations were at issue in *Dole*, and of course the Court held that OMB did not have authority over such disclosure rules.²¹ But, in making this decision, the Court was required to define precisely what types of "information collection requests" were within the authority of OMB:

"The common-sense view of 'obtaining or soliciting facts by an agency' is that the phrase refers to an agency's efforts to gather facts for its own use and that Congress used the word 'solicit' in addition to the word 'obtain' in order to cover information requests that rely on the voluntary cooperation of information suppliers as well as rules which make compliance mandatory," 110 S.Ct., at 934.

"If 'reporting and recordkeeping requirement' is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency....," *Id.*, at 935.

²¹ Resolution of this particular problem was an objective of the 1995 PRA.

"When OMB approves an information collection request, it issues a control number which is placed on all forms. If a request does not receive OMB approval, it is not issued a control number and the agency is prohibited from collecting the information... In addition, if the agency nevertheless promulgates the paperwork requirement, members of the public may ignore it without risk of penalty... However, this protection of the public is applicable only to information gathering rules," *Id.*, at 937.

"[T]he public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency," *Id.*, at 937.

The principle of law which manifests itself within these four cases may be succinctly stated. As the Supreme Court concluded in *Dole*, a regulation subject to the PRA is one which commands that information be provided directly to a federal agency. The decision in *Action Alliance* expands the definition of those regulations within the scope of the PRA to those which mandate availability of information to an agency. And both *Smith* and *Hatch* demonstrate the consequence of the failure of a regulation subject to the PRA to display a control number: no civil or criminal penalty for a violation of the regulation may be imposed.

There have been some decisions regarding the application of the PRA to various tax forms and instruction booklets. For example, in *United States v. Bentson*, 947 F.2d 1353 (9th Cir. 1991), and *United States v. Hicks*, 947 F.2d 1356 (9th Cir. 1991), those defendants sought to apply the *Dole-Smith-Hatch* rule to the instruction booklet for tax form 1040. But here, the very

same Circuit which created the *Smith-Hatch* rule rejected such challenges ("The PRA was not meant to provide criminals with an all-purpose escape hatch... If, in enacting the PRA, Congress had intended to repeal 26 U.S.C., §7203, it could have done so explicitly;" see *Hicks*, 947 F.2d, at 1359).

In *United States v. Dawes*, 951 F.2d 1189, 1192 (10th Cir.1991), that court was confronted with the PRA issue being raised by these convicted tax crime defendants. Here, the Tenth Circuit declared that income tax regulations "simply assist taxpayers to complete tax forms" and "are subsidiary to and mere administrative appendages of the tax form. They function only to aid the taxpayer in providing the information required by the 1040 form." For this reason, the *Dawes* court concluded that tax regulations don't need OMB control numbers. See also *United States v. Neff*, 954 F.2d 698 (11th Cir. 1991). These cases dealing with federal income tax legislation, which is a far different legislative scheme than that involving FCC statutes and regulations, are readily distinguishable for this reason.

D. Compliance by the FCC with the PRA.

The FCC regulations which are relevant for this case are codified at 47 C.F.R., part 73. Pursuant to the PRA regulations, the FCC has adopted a tabular list of its collections of information which have been assigned OMB control numbers; see 47 C.F.R., §0.408. This list identifies all of the part 73 FCC regulations which have been assigned control numbers, and those regulations are

47 C.F.R., §§ 73.30, 73.37, 73.45, 73.51, 73.61, 73.68, 73.69, 73.99, 73.158, 73.661, 73.687, 73.932, 73.961, 73.1125, 73.1207, 73.1212, 73.1250, 73.1350, 73.1510, 73.1560, 73.1590, 73.1610, 73.1615, 73.1620, 73.1635, 73.1680, 73.1690, 73.1740, 73.1820, 73.1870, 73.1920, 73.1930, 73.1942, 73.1943, 73.2080, 73.3523, 73.3525B, 73.3526, 73.3527, 73.3538, 73.3544C, 73.3550, 73.3588, 73.3589, 73.3594, and 73.3613. Noticeably absent from this list are the assignments of OMB control numbers for the regulations at issue here, §§ 73.3511, 73.3512, 73.3513 and 73.3514. The FCC is acutely aware of the requirement for its regulations to have control numbers, because it admits as much at 47 C.F.R., §0.408:

"Notwithstanding any other provisions of law, no person shall be subject to any penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number."

Does the FCC understand precisely which of its regulations must be approved by OMB? An examination of certain regulations which do have these control numbers more than adequately demonstrates that it does. For example, §73.51 contains the following collection of information:

"(c) Applications for authority to operate with antenna input power which is less than nominal power and/or to employ a dissipative network in the antenna system shall be made on Form 302."

Section 73.68 contains several collections of information:

"(b) A station having an antenna sampling system constructed according to the specifications given in paragraph (a) of this section, may obtain approval of that system by submitting an informal request to the FCC in Washington, DC."

"(d)(4) Request for modification of license shall be submitted to the FCC in Washington, DC, within 30 days of the date of sampling system modification or replacement. Such request shall specify the transmitter plate voltage and plate current, common point current, base currents and their ratios, antenna monitor phase and current indications, and all other data obtained pursuant to this paragraph."

Section 73.69 contains the following collection of information:

"(d)(5) An informal request for modification of license shall be submitted to the Commission in Washington, DC, within 30 days of the date of monitor replacement. Such request shall specify the make, type, and serial number of the replacement monitor, phase and sample current indications, and other data obtained pursuant to this paragraph (d) of this section."

In section 73.158, there are at least two collections of information, one of which provides:

"(b) When the descriptive routing to reach any of the monitoring points as shown on the station license is no longer correct due to road or building construction or other changes, the licensee must prepare and file with the FCC, in Washington, DC, a request for a corrected station license showing the new routing description."

Section 73.1510 entitled "Experimental authorizations," contains the following collection of information:

"(b) Experimental authorizations may be requested by filing an informal application with the FCC in Washington, DC, describing the nature and purpose of the experimentation to be conducted, the nature of the experimental signal to be transmitted, and the proposed schedule of hours and duration of the experimentation. Experimental authorizations shall be posted with the station license."

Section 73.1680 (relating to emergency antennas) requires the submission of certain information:

"(b) ... However, an informal request to continue operation with the emergency antenna must be made to

the FCC in Washington, DC, within 24 hours after commencement of its use."

Section 73.1690 concerning modifications of transmission systems provides that, in order for modifications to be made, certain defined information must be provided:

"(b) The following changes may be made only upon specific authority of the FCC. Applications requesting authorization must be filed on FCC Form 301 for commercial stations and on FCC Form 340 for noncommercial educational stations."

Section 73.3538, entitled "Application to make changes in an existing station," provides for information to be submitted regarding the making of changes at radio stations:

"Where prior authority from the FCC is required to make changes in an existing station the following procedures shall be used to request that authority:

"(a) An application for a construction permit using the forms specified in §73.3533 must be filed for authority to make the following changes:"

.

"(b) An informal application filed in accordance with §73.3511 is to be used to obtain authority to make the following changes in the station authorization:"

All of these regulations do have OMB control numbers assigned to them and the reason why is related to their obvious requirements that information and even forms be submitted to the FCC. Incidentally, it must be noted that Forms 301 and 340 are mentioned in the above regulations. Form 301 has been assigned OMB control number 3060-0027, and Form 340 has been assigned control number 3060-0034. It is also interesting to note that §73.3538(b) quoted above acknowledges that §73.3511 is a collection of information.

The regulations applicable here are no different from those quoted above. For example, §73-3512 requires information to be submitted to the FCC:

"All applications for authorizations required by §73-3511 shall be filed at the FCC in Washington, DC... The number of copies required for each application is set forth in the FCC Form which is to be used in filing such application."

Section §73-3514 provides:

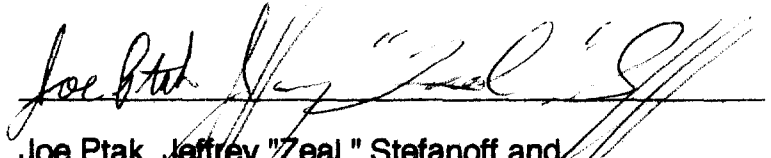
"(a) Each application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated."

There can be no dispute that these extremely important regulations do in fact constitute collections of information under the PRA; but the problem arises from the fact that they lack assigned OMB control numbers. The law expressly allows members of the public like Joe Ptak, Jeffrey "Zeal" Stefanoff and the Hays County Guardian et. al, to "regulate the regulators" and this is done by "ignoring with impunity" those collections of information which fail to display an OMB control number.

CONCLUSION

For the reason that the FCC has failed to obtain OMB approval for the collections of information codified at 47 C.F.R. , §73.3511, et seq., the public protection provisions of 44 U.S.C., §3512 operate here so as to foreclose this prosecution. Consequently, the cause for a Cease and Desist Order and any indictments must be dismissed.

Respectfully submitted this the 10 day of May,
1998.

A handwritten signature in black ink, appearing to read "Joe Ptak" followed by a large, stylized flourish that incorporates the word "Zeal". The signature is written over a horizontal line.

Joe Ptak, Jeffrey "Zeal" Stefanoff and
the Hays County Guardian et.al,
Directors, Kind RadioSan Marcos
Publishers Hays County Guardian
P.O. Box 305
San Marcos, Texas 78667

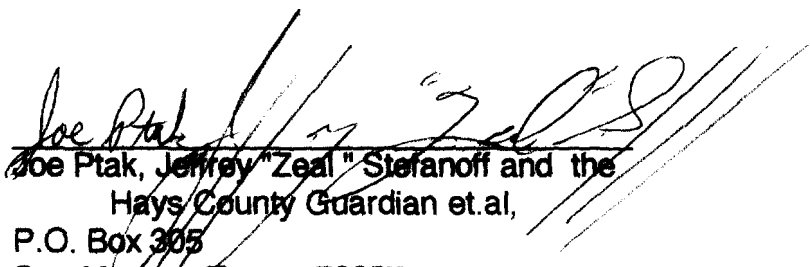
CERTIFICATE OF SERVICE

We hereby certify that we have this date served a copy of the foregoing motion upon the below named Hearing Examiner and counsel for the Federal Communication Commission by depositing the same in the United States mail, postage prepaid, in envelopes addressed to them at their correct mailing addresses:

Federal Communication Commission
att: Judge Richard Sipple
1919 M. ST. N.W.
Washington, D.C. 20554

Federal Communication Commission
att: Norman Goldstein, Chief
1919 M. St. N.W.
Washington, D.C. 20554

Dated this the 10 day of May, 1998.


Joe Ptak, Jeffrey "Zeal" Stefanoff and the
Hays County Guardian et.al,
P.O. Box 305
San Marcos, Texas 78667